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Supreme Court of the United States.

October Term, 1930.

No. 33.

HAROLD J. COOLIDGE and AUGUSTUS P. LORING,
TRUSTEES, APPELLANTS,

v.

HENRY F. LONG, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.

No. 34.

SAME v. SAME.

BRIEF FOR THE APPELLANTS.

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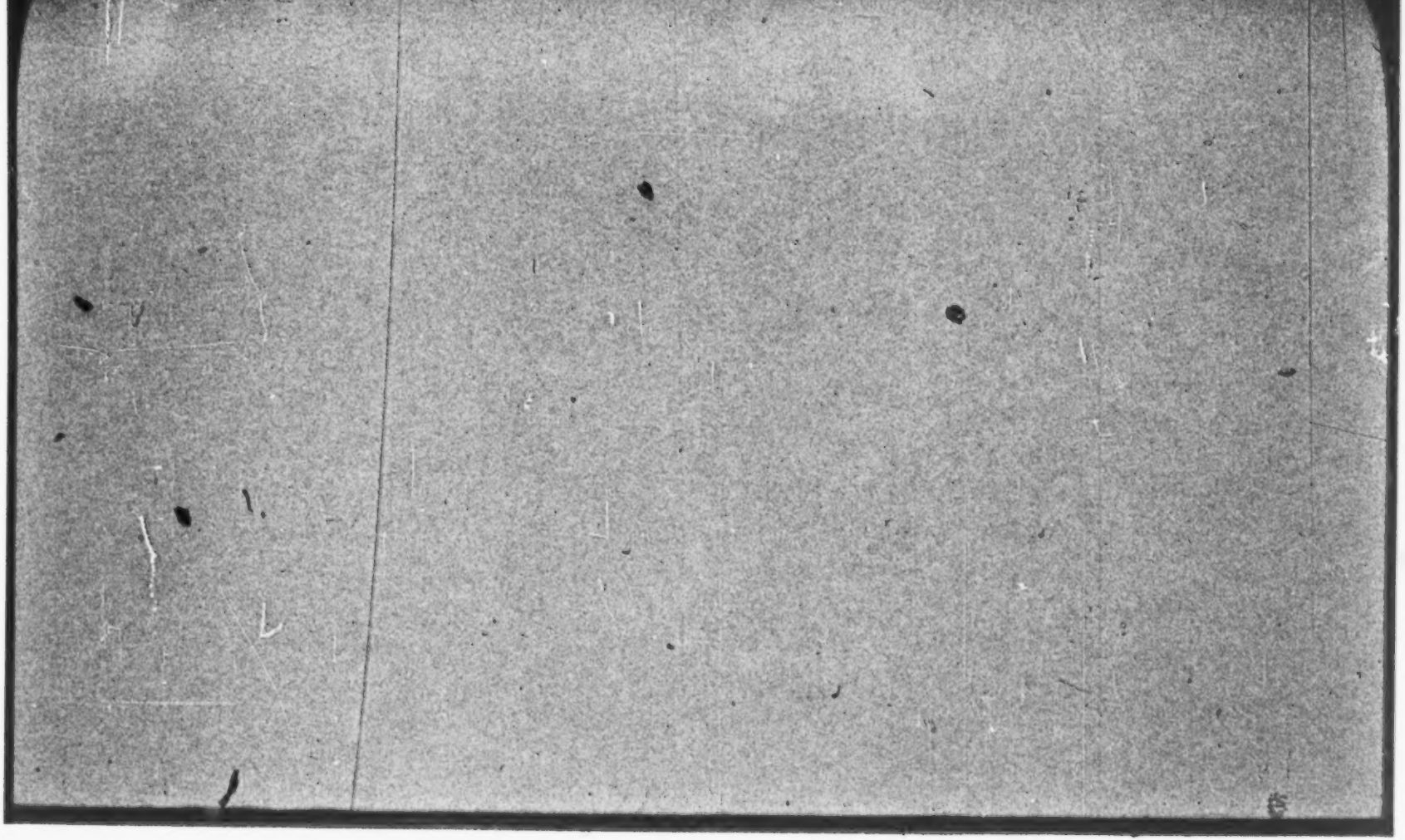

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Supreme Court of the United States.

OCTOBER TERM, 1930.

[No. 33]

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING,
TRUSTEES, APPELLANTS,
v.
HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

[No. 34]

SAME *v.* SAME.

BRIEF FOR THE APPELLANTS.

The appellants in both the present cases are the trustees under a deed executed by J. Randolph Coolidge and Julia Coolidge, his wife, both of Brookline, Norfolk County, Massachusetts. The first case relates to an inheritance tax assessed under color of Section 1 of Chapter 65 of the General Laws of Massachusetts upon that part of the trust property furnished by Julia Coolidge. The second case concerns a similar tax assessed upon the part furnished by J. Randolph Coolidge. The questions involved in the two cases are in all respects the same. The respective records are complete in themselves, but are practically identical; references in this brief to the pages of the "record" will, there-

fore, be understood as relating to the designated pages in each record. In the course of printing the records the respective petitions by which the two cases were begun in the Probate Court for Norfolk County, Massachusetts, have been transposed, so that the petition relating to the tax upon the property furnished by Julia Coolidge appears on page 2 of the record in the second case and *vice versa*. This misplacement has been corrected by a stipulation filed with the clerk of this court. The original petition in each case was, moreover, superseded by an amended petition upon which the case was heard and determined. These amended petitions appear in their proper places on page 3 of the respective records.

The Opinion of the Court Below.

The opinion of the Supreme Judicial Court (R. 14) is not yet officially reported, but has been printed in Mass. Adv. Sh. [1929] 1831 and in 167 N.E. Rep. 757.

The Jurisdiction of this Court.

The petitioners requested the state courts to rule that, if the statute under color of which the taxes in question were assessed authorized the imposition of these taxes, it was repugnant to various provisions of the Constitution of the United States (R. 13). By the final decrees all these requests were denied (R. 24). On March 10, 1930, this court made a finding of probable jurisdiction in each case.

Statement of the Cases.

The present proceedings were begun pursuant to Section 27 of Chapter 65 of the General Laws of Massachusetts, which, as amended by Section 18 of Chapter 520 of the Acts of 1922, provides in substance that all succession taxes shall be assessed by the Commissioner of Corporations and Tax-

ation and that a person aggrieved by any determination of the Commissioner may within one year after the payment of the tax apply by a petition in equity to the Probate Court having jurisdiction of the decedent's estate for the abatement of the tax. The facts which appeared at the hearing in the Probate Court are stated as follows in the opinion of the Supreme Judicial Court (R. 14-15):—

> "The petitioners are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge and Julia Coolidge and the petitioners. By that deed a large amount of real and personal estate was transferred to the trustees by the settlors voluntarily and not as a bona fide purchase for full consideration in money or in money's worth. The trustees were given extensive powers of management, investment and re-investment with the right to determine finally what receipts and payments should be credited to income or principal. The part of the trust fund furnished by J. Randolph Coolidge was four sevenths, and the part furnished by Julia Coolidge was three sevenths. By the terms of the trust the income was to be paid in these proportions to each of the settlors during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share. There was in the declaration of trust no power of revocation or modification or termination prior to the death of the survivor of the settlors. *Coolidge* v. *Loring*, 235 Mass. 220. By instrument executed on April 6, 1917, the settlors assigned their interest in

the trust to the five sons, all of whom eventually survived the termination of the trust. Julia Coolidge died in January, 1921, and J. Randolph Coolidge on November 10, 1925, both being residents of this Commonwealth. The defendant determined that the petitioners were subject to excise taxes under G. L. c. 65, §1, as amended, upon the four sevenths and upon the three sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925. There is no controversy as to the amount of the excise if any is due."

The pertinent statutes are summarized by the Supreme Judicial Court as follows (R. 15-17):—

"When the declaration of trust was executed, no statute was operative under which the trust property could have been subjected to an excise because the succession was to direct descendants of the settlors. Statutes then in force provided for levy of an excise only where the succession was to collateral relatives and to strangers. There had been approved on June 27, St. 1907, c. 563, which took effect on September 1, 1907, about five weeks after the date of the declaration of trust. This is the first relevant statute. Its provisions were: §1. 'All property within the jurisdiction of the Commonwealth . . . which shall pass by . . . deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person . . . shall be subject to a tax. . . .' §25. 'This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date. . . .' Said §1 was amended in particulars not here material by St. 1912, c. 678, §1. It was provided by §3 of the latter statute: 'The provisions of section one of this act

shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant or gift except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof. . . .' Said §25 was amended by St. 1914, c. 563, §1, so as to read: 'This part shall not apply to . . . property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date [September 1, 1907]. . . .' The relevant statutory provisions operative since January 1, 1921, are in G.L. c. 65, as follows: §1. 'All property within the jurisdiction of the commonwealth . . . which shall pass by . . . deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth . . . made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax . . .'; §36. 'This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty. . . .'

"The question for decision is whether the net trust estate passing to the sons on the death of the surviving settlor is subject to excise taxes under these statutes."

The full text of the several statutes is given in the appendix to this brief.

The petitioners (now appellants) requested the Probate Court in each case to rule (*a*) that the statute under color of which the tax in question was assessed did not according to its true construction authorize the imposition of such a tax, (*b*) that the statute, if construed as authorizing the

imposition of the tax, was repugnant to the Constitution of Massachusetts and (c) that the statute, if so construed, was repugnant to the Constitution of the United States in the particulars specified in the fourth, fifth, sixth and seventh rulings thus requested. These rulings were as follows (R. 13):—

> "4. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the trust indenture of July 29, 1907.
>
> "5. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the assignment of April 6, 1917.
>
> "6. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.
>
> "7. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States."

The Probate Court, without making any decision, reserved all questions of law presented by the cases for the determination of the Supreme Judicial Court (R. 12). This procedure was in accordance with Sections 9 and 13 of Chapter 215 of the General Laws of Massachusetts, which are quoted in the appendix. The petitioners' requests for rulings were embodied in the reservations (R. 13). The Supreme Judicial Court sent down in each case a rescript

(R. 14) directing that the petition be dismissed and incorporating by reference the opinion referred to above (R. 14-23). In this opinion it was held in substance that none of the petitioners' contentions were well founded and that the tax was lawfully assessed; after examining many authorities, including various decisions of this court, it was stated that "the validity of the present statute under the Constitution of the United States and of this Commonwealth appears to us to be established by these and the other authorities already cited." The Probate Court thereupon entered in each case a final decree denying the petitioners' several requests for rulings and dismissing the petition (R. 23-24). Under the Massachusetts practice the decrees so entered constitute the final decisions of the highest court of the State in which decisions could be had, so that the appeals are taken directly from those decrees.

Davis v. *L. L. Cohen & Co., Inc.*, 268 U.S. 638.

Specification of Errors.

The appellants recognize that this court will not review the rulings of the state courts as to the construction of the statute or as to its conformity to the state constitution. They have, therefore, assigned errors only with respect to the refusal of those rulings which involve federal questions. The ten assignments of error, all of which are insisted upon (R. 24-25), present in different forms the contention that the statute as interpreted by the state courts is repugnant to the Constitution of the United States,—

(*a*) Because it deprives the appellants and those claiming under them of their property without due process of law and impairs the obligation of the contracts embodied in the deed of trust and in the assignment;

(*b*) Because it denies to the appellants and those claiming under them the equal protection of the laws.

ARGUMENT.

In *Nichols* v. *Coolidge*, 274 U.S. 531, § 402 (*c*) of the Revenue Act of 1918 was held unconstitutional as applied to the trust now in question. The Supreme Judicial Court refused to follow this decision on the ground that the tax imposed by the Revenue Act of 1918 is an estate tax, whereas the tax now in question is a succession tax. The appellants submit that, with reference to the particular facts now presented, this difference between the respective taxes is immaterial.

1. Since the grantors reserved no right to revoke or otherwise to affect the devolution of the trust property, the establishment of the trust was the only occasion with respect to which an excise might be imposed; the mere fact that some element of contingency affecting the rights of the other beneficiaries ceased after the statute took effect did not enable the State to impose a tax so long as these rights could not be divested by any act done by the grantors or by any one else after that date.

2. Upon the construction adopted by the state courts, the statute, as applied to trusts under which the settlor has no beneficial interest, makes an arbitrary discrimination between cases in which the death of the settlor is designated as the occasion upon which the rights of the beneficiaries are to be freed from possible divesting and those in which some other event is so designated.

I.

The Statute as construed by the Courts below is repugnant to the Due Process Clause of the Fourteenth Amendment and impairs the Obligation of the Contracts embodied in the Trust Deed and Assignment.

The relations of the statute to these two constitutional restrictions will be considered together, since the issues

arising under each of them are substantially the same. The fundamental question is whether rights had so vested prior to the imposition of the tax that there was thereafter no occasion with respect to which a tax might properly be imposed. In most of the cases cited below, the discussion has been as to whether the imposition of a tax under such circumstances deprives the taxpayer of his property without due process of law. In some of them, however, stress has been laid upon the effect of such a tax as impairing the obligation of contracts. If rights granted by a deed are so vested that interference with them impairs the obligation of the contract embodied in the deed, it necessarily follows that such interference deprives the grantee of his property without due process of law. The converse is equally true. In the following discussion, therefore, the appellants have not attempted to classify the cases according as they relate primarily to the due process clause or to the prohibition against impairing the obligation of contracts. If on any theory the rights of the beneficiaries were so vested that the State could not interfere with them, it follows that the appellants' 4th, 5th, 6th and 7th requests (R. 13) should have been given and that the statute, as applied to the present situation, cannot stand.

The Supreme Judicial Court (R. 17) states that the question for decision is whether the trust estate "is subject to excise taxes" under the statutes of Massachusetts. The respondent, it is understood, recognizes that, unless the tax can be sustained as an excise, it must fail altogether; if the statute were construed as imposing a property tax, it would be repugnant to the Constitution of Massachusetts.

Minot v. *Winthrop*, 162 Mass. 113.

The case, therefore, presents a situation which has arisen many times in different state courts and as to which the decisions, other than that now under review, are all to the

effect that the attempt to impose an excise constitutes an unwarranted interference with vested rights.

Hunt v. *Wicht*, 174 Cal. 205.
Lacey v. *State Treasurer*, 152 Iowa, 477.
State v. *Probate Court of Washington County*, 102 Minn. 268.
Matter of Pell, 171 N.Y. 48.
Matter of Craig, 97 App. Div. 289; affirmed 181 N.Y. 551.
Houston's Estate, 276 Penn. St. 330.
Commonwealth v. *Wellford*, 114 Va. 372.

As is pointed out in these cases, the vital question in such a situation is as to when the succession to the property takes place, because the succession is the subject of the tax. If the succession is complete before the tax law is enacted, the effect of the law, if construed as appiying to such a case, is to impose an excise with respect to a past transaction and this, it is very clear, cannot be done.

Untermyer v. *Anderson*, 276 U.S. 440.
Blodgett v. *Holden*, 275 U.S. 142.
Nichols v. *Coolidge*, 274 U.S. 531.

A comprehensive statement of the principle is found in the opinion of Mr. Justice Holmes in *Chanler* v. *Kelsey*, 205 U.S. 466 (at p. 480). The difference between his views and those of the majority was as to the application of the rule to the particular facts presented and not at all as to the rule itself.

> "If . . . a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step

necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be."

If the owner of property conveys it to trustees to pay the income to himself for life and on his death to distribute the principal among specified individuals, these individuals succeed to the property upon the execution of the trust instrument. It is the shifting of the power to control the devolution of the property and not the change in actual possession or enjoyment that constitutes the essence of "succession."

Chase National Bank v. *United States*, 278 U.S. 327.
Reinecke v. *Northern Trust Co.*, 278 U.S. 339.
May v. *Heiner*, 281 U.S. 238.

Hence, as is held in *Hunt* v. *Wicht*, 174 Cal. 205, and the other cases in the group cited above, an excise with respect to the succession cannot be imposed by an act passed after the trust instrument is delivered.

Although these cases were, of course, brought to the attention of the Supreme Judicial Court, the opinion of that court makes no reference to them, so that the reasons for deeming them inapplicable are left to inference. It was not suggested that the statute, as applied to the present

situation, could be sustained on the theory that it was designed to prevent evasion of the tax upon testamentary dispositions, since there was no such tax at the time when the trust was established. Neither was it attempted to uphold the tax on the ground that the transfer was in contemplation of death; the facts furnish no foundation for any such contention. Since the settlors retained no right of revocation and no power to control the devolution of the property in any way, there was no basis for distinction in that respect. Emphasis was, however, laid on the fact that, in the present cases, the interest of each son, while vested, was subject to be divested in favor of his next of kin if he should die before the survivor of the settlors and it was said that the succession therefore took place when the survivor of the settlors died. Upon this point the court said (R. 20-21):—

> "Under the deed of trust while either settlor lived the sons had no unrestricted right to receive and to use the proceeds of the property such as came to them upon the death of the last surviving settlor.
>
> "It is that succession to unrestricted and absolute title, in place of no possession or enjoyment whatever and a contingency as to title, which is made subject to the excise under the statute. The acquisition of the rights which accrued to the five sons on the death of the last settlor was a fundamental change in the nature of their relation to and interest in the trust.
>
> "It replaced a contingency with a certainty. Full title, complete and unrestricted in every particular, did not vest in them until that event. By that event the actual transfer of the possession of the trust fund passed under the terms of the deed of July, 1907, from the trustees to the five sons and the full enjoyment thereof as to title and income for the first time became theirs. It seems to us that this change constituted a succession. The excise is not levied on mere enjoyment, possession or ownership: it is levied upon the assured and com-

pleted ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title. We think that this constituted a succession which lawfully might be made subject to the excise by a statute enacted and effective before such succession took place."

The same facts in substance were presented, however, in several of the cases cited by the appellants from other States and the element of defeasibility was expressly held immaterial. Thus in *Matter of Pell*, 171 N.Y. 48, which has often been referred to as a leading case, the court said (at p. 55):—

"This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation."

The facts and the conclusion were substantially the same in *Matter of Craig*, 97 App. Div. 289 (affirmed on opinion

below, 181 N.Y. 551), *Lacey* v. *State Treasurer*, 152 Iowa, 477, and *Houston's Estate*, 276 Penn. St. 330.

In *Carter* v. *Bugbee*, 92 N.J. L. 390, which may be cited as supporting a contrary view, the court was careful to distinguish *Matter of Pell* and similar cases and rested the decision on the narrow ground that under the instrument before it the remainder interests were purely contingent and not, as in *Matter of Pell*, vested subject to a defeasance; it was indicated that, if the trust deed had effected an immediate transfer of the title to the remainder, the decision might well have been the other way. In *People* v. *Carpenter*, 264 Ill. 400, the facts somewhat resembled those in *Carter* v. *Bugbee*, but the only question decided was one of statutory construction. It is submitted, therefore, that this court should be slow to hold,—as must be held if the judgments now in question are affirmed,—that *Hunt* v. *Wight*, *Matter of Pell* and the other cases to the same effect were wrongly decided. The significance of such a weight of authority was remarked upon by Mr. Justice White in *Haddock* v. *Haddock*, 201 U.S. 562 (at p. 585):—

> "Whilst we may not avoid the duty of interpreting for ourselves the Constitution of the United States, in view of the persuasive force that would result if an overwhelming line of state decisions held the asserted doctrine, we come to consider that subject."

Decisions of state courts cannot, of course, prevail against controlling decisions by this court, but in the present situation there are no such controlling decisions. On the contrary, the conclusion reached by the Court of Appeals of New York and by the other courts which have taken the same view is the only one consistent with the opinions of this court. Indeed, the recent decision in *May* v. *Heiner*, 281 U.S. 238, is in itself almost enough to settle the whole matter. While the precise question decided in that case was one of statutory construction, rather than constitu-

tional power, the reasoning tends strongly to the result that, in a case like the present, the succession takes place once and for all when the trust instrument is executed and that there is no succession in the proper sense upon the mere ripening of the rights conferred by it. As was recognized in *May* v. *Heiner*, succession *ex vi termini* is a bilateral affair. There can be a succession in ownership only as one person succeeds to another as owner. In a case like the present the beneficiaries succeed to the settlors at the execution of the trust instrument; the respective rights of the settlors and beneficiaries in the property are irrevocably fixed at that time. The only persons to whom the sons could be said on any theory to have succeeded on the death of the surviving settlor were their respective next of kin, but it is obvious that there was no succession here; the title was vested in the sons and the mere fading out of the contingent rights of the next of kin (who had no power in any way to deprive the sons of their title) no more constituted "succession" by the sons than would, for example, the lapsing of an attachment through the entry of judgment for the defendant constitute a succession by the owner of the attached property to the attaching creditor. The vital element of a relinquishment of rights by one person in favor of another was altogether lacking.

An analysis of the grounds upon which succession taxes have been upheld by this court confirms this conclusion. Such a tax is valid, if at all, because it relates to the exercise of some privilege which the State may grant or withhold at pleasure. This was settled long ago as to property passing by will or by the laws of intestate succession.

> *United States* v. *Perkins*, 163 U.S. 625, 628.
> *Mager* v. *Grima*, 8 How. 490, 494.

A tax upon transfers by deed or otherwise *inter vivos* may sometimes be justified as a means of preventing evasion of the tax on testamentary dispositions. Again, the

settlor may in connection with such a transfer reserve for his life a right to revoke the grant or to affect the devolution of the trust property in some other way; in such a case the instrument is really a species of will, so that the basis for imposing a tax at the settlor's death is the same as that for imposing such a tax at the death of a testator. Apart from these considerations,—neither of which, as shown above, is relevant to the present cases,—the only sufficient basis of an excise tax with respect to the ripening of interests created by deed is the fact that the creation of future interests is not one of the rights inherent in every property owner but is, like the creation of rights by will, a privilege which the State may withhold or confer as it sees fit.

> "There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes."
>
> Lamar, J., in *Keeney* v. *New York*, 222 U.S. 525 (at p. 533).

It may be conceded that, when the present trust instrument was executed, both the settlors in creating the various interests for which it provides and the beneficiaries in acquiring these interests were exercising a privilege granted by the State and that, as a condition of the exercise of this privilege, the State might have provided that a tax be paid when the survivor of the settlors should die. This, in effect, was what happened in *Keeney* v. *New York*, *supra;* after the passing of the tax law an owner of property conveyed it

to a trustee to hold for herself for life with remainder over, reserving a power to revoke or alter the trust at pleasure. As the parties availed themselves of the privilege which the State granted, they could not complain of the condition attached to it. The result would have been the reverse if, as in the present cases, the trust had been created at a time when no law imposed any tax with respect to future interests created by deed and the trust deed had reserved no power to alter or revoke. Having granted without restriction the privilege of creating and acquiring these interests, it was not competent for the State afterwards to attach conditions. What had originally been a mere privilege had now become an absolute right and the State could not interfere with it. After the remainders were once vested, the State had no more power to disturb them than it would have had to disturb an estate in actual possession. If, after the present trust was created, the legislature had assumed to pass an act which in any way interfered with the deed's taking effect according to its tenor or prevented the beneficiaries from coming into the enjoyment of all the privileges which it purported to confer upon them, the invalidity of the act would have been too plain for argument.

Aetna Life Ins. Co. v. *Hoppin*, 214 Fed. Rep. 928.
Gilpin v. *Williams*, 25 Ohio St. 283.
Bright v. *Supreme Council Catholic Knights & Ladies of America*, 183 Ky. 388.
Albertson v. *Landon*, 42 Conn. 209.

Rights like those of the sons under the deed now in question are far less tenuous than an estate by courtesy initiate, which, as is well settled, cannot be impaired by legislation.

Jackson v. *Jackson*, 144 Ill. 274.
Rose v. *Rose*, 104 Ky. 48.
Clay v. *Mayr*, 144 Mo. 376.
Wyatt v. *Smith*, 25 W. Va. 813.

These principles are fully recognized in Massachusetts; it has been held, for example, that the common law interest of a husband in a remainder in personal property bequeathed to his wife upon the contingency of her surviving the life tenant cannot be impaired by a statute passed before the happening of the contingency.

Dunn v. *Sargent*, 101 Mass. 336.

It follows that the present tax cannot be sustained on the theory that it is incident to the exercise of a privilege. Neither can it be assimilated to taxes on sales, on conveyances or on contracts; no one becomes subject to a tax of that kind unless he voluntarily does the act upon which the tax is imposed. The present tax must rest on the assumption that whenever anything happens to the advantage of an individual,—even though it comes to pass through circumstances over which neither he nor anybody else has control,—this may be made the subject of an excise. That this is the theory of the Supreme Judicial Court is made clear by the statement that "the excise is not levied on mere enjoyment, possession or ownership," but "upon the assured and completed ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title." The limitless field thus opened for the imposition of excises is manifest. What, for example, is more "tenuous, dubious and immature" than a crop of apples in early spring? If the Supreme Judicial Court is right, the ripening of the crop into saleable fruit is a proper subject, not for a tax on the apples as property, but for an excise on the change from a potentiality into an actuality. The statement of such a doctrine is, the appellants submit, its own answer.

The Supreme Judicial Court maintains, indeed, that this anomalous theory is sanctioned by this court, but an examination of the four cases cited in the opinion shows that this is a misconception.

In *Cahen* v. *Brewster*, 203 U.S. 543, it was held that under the law of Louisiana the property of a testator does not, as against the State, vest in his legatees until the administration of the estate is complete. A tax upon the passing of property by a will allowed shortly before the enactment of the tax law was therefore sustained as a tax on a privilege which was still within the control of the State at the time when the law took effect.

In *Chanler* v. *Kelsey*, 205 U.S. 466, a testatrix who died in 1902 executed by her will a power of appointment created by deed in 1844. The question was whether under a statute passed in 1897 a succession tax might be imposed upon the property passing through the exercise of the power. It was held that, since the will took effect only by virtue of the law as it stood at the donee's death, the acquisition of rights under the power stood on the same footing as the acquisition of rights under the will, so that the tax was valid as the condition of exercising a privilege which the State might either give or withhold. The court said (at p. 478):—

> "We must accept this decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the State of New York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will."

In *Nickel* v. *Cole*, 256 U.S. 222, the Supreme Court of Nevada decided that, according to the true construction of the trust instrument, no rights under it vested until after the effective date of tax law and this court simply held that, as this view was at least arguable and did not appear to have been adopted in order to evade constitutional difficul-

ties, the validity of the statute as applied to rights vested before it took effect could not be gone into.

In *Saltonstall* v. *Saltonstall*, 276 U.S. 260, the Massachusetts statute now under consideration was sustained as applied to a trust which was created before its enactment. The Supreme Judicial Court (R. 21) says that, "although the facts in the case at bar differ in some particulars from those in *Saltonstall* v. *Saltonstall*, . . . that decision supports the conclusion that these excises might lawfully be levied." It becomes important, therefore, to consider just what the facts in *Saltonstall* v. *Saltonstall* were. In the opinion of this court these facts were stated as follows (276 U.S. at p. 268):—

> "On various dates between 1905 and 1907, Peter C. Brooks by indenture transferred to the trustees, defendants in error, or their predecessors, certain property upon trust, to pay the income to him for life or, at his option, to allow it to accumulate, and upon the death of himself and his wife to pay the income to his children, the plaintiffs in error, without any liability for their debts and without power of alienation or anticipation; with gifts over.
>
> "The trust instrument provided that its terms might be changed and the trust terminated in whole or in part by Peter C. Brooks, with the concurrence of one trustee. Before his death, on January 27, 1920, the trust was in fact thrice altered, the last time in 1919 by providing that during the life of Peter C. Brooks the income should be accumulated and added to the principal, so that from that date his interest in the trust was terminated, except for the power with one trustee to alter or terminate it.
>
> "At the time of the several transfers there were no Massachusetts statutes imposing an inheritance or transfer tax upon property passing to children, but before the death of Peter C. Brooks the statutes now assailed were enacted."

It is thus apparent that, while the remainder may have been vested in the technical sense, it was liable at any time during the settlor's life to be wiped out through the exercise of the reserved power of alteration and revocation. What terminated this possibility and rendered the remainder indefeasible was not, as in the present cases, a fortuitous circumstance over which nobody had any control, but the non-exercise of this power. In other words, the interests of the remaindermen, so long as the settlor lived, were liable to be defeated by voluntary intervention, and were finally established by a quasi-testamentary act. For practical purposes, those in whom the power of amendment and revocation was vested were the owners of the fee and it was only when this *de facto* ownership was terminated through the non-exercise of the power that the remaindermen, in any real sense, succeeded to the settlor as the owners of the property.

The decision of this court in *Saltonstall* v. *Saltonstall* was carefully limited to these particular facts. Mr. Justice Stone said (at p. 271):—

> "The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax.
>
> "So long as the privilege of succession has not been fully exercised it may be reached by the tax. . . . And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and

subject to tax. *Bullen* v. *Wisconsin*, 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance.

"Without considering the other statutes involved, we need not go further than to say that the statute of 1909, imposing the tax because of the failure to exercise the power of appointment, does not deprive plaintiffs in error of their property without due process of law."

The paragraph last quoted is significant. The Supreme Judicial Court had undertaken to sustain the tax not only on the ground that the non-exercise of the power of revocation constituted the non-exercise of a power of appointment within the meaning of the Massachusetts statute, but also on the broad ground that the mere coming into possession by the remaindermen on the settlor's death was itself taxable (256 Mass. 519). This court, however, avoided committing itself to any such doctrine and affirmed the judgment of the Supreme Judicial Court solely on the narrow ground first mentioned.

In the present cases the essential facts are exactly the opposite of those in *Saltonstall* v. *Saltonstall*. The gift taxed was completed when the trust deed was executed and it then passed to the beneficiaries beyond recall. No power of alteration or revocation was reserved. Nothing done or omitted by the donor or by any one else after the establishment of the trust affected in any way the devolution of the property, or, indeed, could have affected it.

The distinction is pointed out by the Supreme Court of Minnesota in the case of *State* v. *Brooks*, decided Septem-

ber 26, 1930 (U.S. Daily, October 10, 1930, p. 7). A settlor created a trust reserving to himself a general power of appointment by will and providing that in default of appointment the trust property should be conveyed to his heirs at his death. Very large powers to dispose both of the income and of the principal during the settlor's life were given to the trustees. The settlor died intestate. It was held that a succession tax might be levied under an act which took effect after the making of the trust deed, the court saying that the case was governed by *Chanler* v. *Kelsey*, 205 U.S. 466, and *Saltonstall* v. *Saltonstall*, for the reason that the reservation of the power to appoint by will had the same effect as a power of revocation, and that *Nichols* v. *Coolidge*, 274 U.S. 531, was not controlling because there was in that case "no reserve power either of revocation or of appointment." *State* v. *Probate Court of Washington County*, 102 Minn. 268, cited above, was distinguished on the same ground.

If the decision of the Supreme Judicial Court in the cases at bar is right, it follows, not only that the distinction thus drawn by the Supreme Court of Minnesota was mistaken, but that all of the points upon which this court was so careful to insist in *Saltonstall* v. *Saltonstall* were irrelevant, and that the opinion,—with its plain implication that the tax was valid only because these elements were present,—was entirely misconceived. The appellants do not believe that this court was laboring under any such misapprehension.

II.

The Statute as construed by the Courts below denies to the Petitioners and to those claiming under them the equal Protection of the Laws.

For the purpose of determining whether the tax is discriminatory reference must be made to the state of things which actually existed when the survivor of the settlors

died. At that time, as at all times subsequent to the assignment, the entire beneficial interest in the trust property was vested in the sons.

Blanchard v. *Blanchard*, 1 Allen, 223.

All that prevented the arrangement from becoming a mere dry trust, so as to enable the sons to call for the immediate conveyance of the legal title, was the possibility that a son might die while one or both of the parents survived, in which event his interest would be divested and his next of kin would take his share.

The respondent, as the appellants understand, virtually concedes that the right of the State to impose a tax at the death of the survivor of the settlors is at least no greater than it would be if the trust had been created at the date of the assignment and if the trust deed itself had vested the entire beneficial interest in the sons, subject as to any one of them who might die before the survivor of the settlors to be divested in favor of his next of kin.

Brown v. *Gulliford*, 181 Iowa, 897.
People v. *Welch's Estate*, 235 Mich. 555.

Upon Mrs. Coolidge's death nothing moved from her or her estate and no interest theretofore enjoyed by her ceased. Her death had no effect whatever upon the trust property except as it affected the relation of third persons to it. The same was true with respect to Mr. Coolidge's death. If any event except the deaths of the settlors,—*e.g.*, the death of some third person,—had been named as fixing the time when the possibility of divesting was to cease, there would be no tax on any theory. It was, therefore, earnestly contended in the state courts by the appellants both in their requests for rulings and in argument that, if the statute applies to the present situation, it arbitrarily singles out a particular event as an occasion for a tax and that, if the settlor retains

no interest in the property and neither he nor his nominee has any control over it, there is no justification for imposing a tax at the time of *his* death and at the same time imposing no tax upon the happening of any other event which might similarly affect the rights of the beneficiaries. The Supreme Judicial Court did not see fit to refer to this contention, but it is submitted that an argument supported by repeated decisions of this court cannot be brushed aside so lightly.

In *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, it was recognized that a tax imposed upon any such theory would be most anomalous and it was therefore held that a statute ought not, in the absence of unmistakable language, to be construed as intended to impose it. The court said (at p. 347):—

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

In the present cases the Supreme Judicial Court has held that the legislature of Massachusetts intended the result which this court deemed "so incongruous" that an intention to produce it could not be imputed to Congress and it must, therefore, be assumed for the present purpose that the legislature undertook to make the purely arbitrary distinction upon which the respondent insists. Such a discrimination, the appellants submit, is repugnant to the rules upon which this court has acted in many recent cases.

While the power of classification for purposes of taxation is broad, it will not sustain a discrimination having no reasonable basis.

> *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32.
>
> *Air-Way Electric Appliance Corporation* v. *Day*, 266 U.S. 71.
>
> *Royster Guano Co.* v. *Virginia*, 253 U.S. 412.
>
> *Southern Railway* v. *Greene*, 216 U.S. 400.

Schlesinger v. *Wisconsin*, 270 U.S. 230, is especially pertinent. In that case the court said (at p. 239):—

> "No question is made of the State's power to tax gifts actually made in anticipation of death, as though the property passed by will or descent; nor is there denial of the power of the State to tax gifts *inter vivos* when not arbitrarily exerted.
>
> "The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere *prima facie* presumption of fact.
>
> "The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other

times are not thus treated. There is no adequate basis for this distinction."

The following remark by Mr. Justice Lamar in *Keeney* v. *New York*, 222 U.S. 525 (at p. 536), will perhaps be cited by the respondent as sustaining a contrary view:—

> "There can be no arbitrary and unreasonable discrimination. But when there is a difference it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the Fourteenth Amendment is concerned, the State could put transfers intended to take effect at the death of the grantor in a class with transfers by descent, will or gifts in contemplation of the death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event."

The meaning of this passage is lost, however, unless the words "in the present instance" are noted. In *Keeney* v. *New York* the trust instrument reserved to the settlor both a life interest and a power of revocation; there were, therefore, ample grounds for imposing a tax at the death of the settlor, although there would have been no tax if the death of a third person had been named as the decisive event. The question now presented was not before the court and the language of the opinion was limited to the particular facts.

As applied to the present situation, therefore, the statute, —even if it would be constitutional as applied to a case in which the settlor had retained a life interest,—deprives the petitioners and those claiming under them of the equal protection of the laws.

ROBERT G. DODGE.
HAROLD S. DAVIS.

MASSACHUSETTS STATUTES.

Acts of 1907, Chapter 563.

SECTION 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the commonwealth or not, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by law exempt from taxation, or for or upon trust for any charitable purposes, or to or for the use of a city or town for public purposes, or to or for the use of (class A) the husband, wife, lineal ancestor, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter, of a decedent, or to or for the use of (class B) the brother, sister, nephew or niece of a decedent, shall be subject to a tax of five per cent of its value for the use of the commonwealth; and such property which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the commonwealth if such value does not exceed fifty thousand dollars, to a tax of one and one half per cent if its value exceeds fifty thousand and does not exceed one hundred thousand dollars, and to a tax of two per cent if its value exceeds one hundred thousand dollars; and such property which shall so pass to or for the use of a member of class B shall be subject to a tax of three per cent of its value for the use of the commonwealth if such value does not exceed twenty-five thousand dollars, to a tax of four per cent if its value exceeds twenty five thousand and does not exceed one hundred thousand dollars, and to a tax of five per cent

if its value exceeds one hundred thousand dollars; and administrators, executors and trustees, and any grantees under such conveyance made during the grantor's life, shall be liable for such taxes, with interest, until the same have been paid; but no bequest, devise or distributive share of an estate which shall so pass to or for the use of a husband, wife, father, mother, child or adopted child of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this act; but no tax shall be exacted upon property so passing which shall reduce its value below the amount of the above exemptions.

Section 25. This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date; but said estates and property shall remain subject to the provisions of the laws in force prior to the passage of this act.

Section 27. This act shall take effect on the first day of September in the year nineteen hundred and seven.

Acts of 1909, Chapter 490, Part IV.

Section 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the commonwealth or not, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by law exempt from taxation, or for or upon trust for any charitable purposes, or to or

for the use of a city or town for public purposes, or to or for the use of (class A) the husband, wife, lineal ancestor, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter, of a decedent, or to or for the use of (class B) the brother, sister, nephew or niece of a decedent, shall be subject to a tax of five per cent of its value for the use of the commonwealth; and such property which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the commonwealth if such value does not exceed fifty thousand dollars, to a tax of one and one half per cent if its value exceeds fifty thousand and does not exceed one hundred thousand dollars, and to a tax of two per cent if its value exceeds one hundred thousand dollars; and such property which shall so pass to or for the use of a member of class B shall be subject to a tax of three per cent of its value for the use of the commonwealth if such value does not exceed twenty-five thousand dollars, to a tax of four per cent if its value exceeds twenty-five thousand and does not exceed one hundred thousand dollars, and to a tax of five per cent if its value exceeds one hundred thousand dollars; and administrators, executors and trustees, and any grantees under such conveyance made during the grantor's life, shall be liable for such taxes, with interest, until the same have been paid; but no bequest, devise or distributive share of an estate which shall so pass to or for the use of a husband, wife, father, mother, child or adopted child of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this part; but no tax shall be exacted upon property so passing which shall reduce its value below the amount of the above exemptions.

Section 25. This part shall not apply to estates of persons deceased prior to the date when chapter five hun-

dred and sixty-three of the acts of the year nineteen hundred and seven took effect, nor to property passing by deed, grant, sale or gift made prior to said date; but said estates and property shall remain subject to the provisions of law in force prior to the passage of said chapter.

Acts of 1912, Chapter 678.

SECTION 1. Section one of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, codified as section one of Part IV of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, as amended by section one of chapter two hundred and sixty-eight and section one of chapter five hundred and twenty-seven of the acts of the year nineteen hundred and nine, is hereby further amended by striking out said section and inserting in place thereof the following:— *Section 1.* All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth, or any interest therein, belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of this commonwealth exempt from taxation, or for or upon trust for any charitable purposes, to be carried out within this commonwealth, or to or for the use of a city or town within this commonwealth for public purposes, or to or for the use of (class A) the husband, wife, lineal ancestor, lineal descendant, adopted child, the lineal descendant of any adopted child, the adoptive parent or lineal ancestor of an adoptive parent,

the wife or widow of a son, or the husband of a daughter, of a decedent, or to or for the use of (class B) the brother, sister, nephew or niece of a decedent, shall be subject to a tax of five per cent of its value for the use of the commonwealth, if its value does not exceed fifty thousand dollars, to a tax of six per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of seven per cent if its value exceeds two hundred and fifty thousand and does not exceed one million dollars, and to a tax of eight per cent if its value exceeds one million dollars; and such property which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the commonwealth if such value does not exceed fifty thousand dollars, to a tax of two per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of three per cent if its value exceeds two hundred and fifty thousand and does not exceed one million dollars, and to a tax of four per cent if its value exceeds one million dollars; and such property which shall so pass to or for the use of a member of class B shall be subject to a tax of two per cent of its value for the use of the commonwealth if such value does not exceed ten thousand dollars, to a tax of three per cent if its value exceeds ten thousand and does not exceed twenty-five thousand dollars, to a tax of five per cent if its value exceeds twenty-five thousand and does not exceed fifty thousand dollars, to a tax of six per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of seven per cent if its value exceeds two hundred and fifty thousand and does not exceeds one million dollars, and to a tax of eight per cent if its value exceeds one million dollars; and administrators, executors and trustees, and any grantees under such conveyance made during the grantor's life, shall be liable for such taxes, with interest, until the same have been paid; but no bequest, devise or distributive share of an

estate which shall so pass to or for the use of a husband, wife, father, mother, child, adopted child, adoptive father or adoptive mother of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this act; but no tax shall be exacted upon property so passing which shall reduce its value below the amount of the above exemptions. All taxes under this act shall be paid out of and chargeable to capital and not income, unless otherwise provided in a will or codicil, but nothing herein contained shall affect any right of the commonwealth to collect such tax or lien therefor.

Section 3. The provisions of section one of this act shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant or gift except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof; and to all property passing by the exercise of or failure or neglect to exercise a power of appointment, whenever created, unless such exercise or failure or neglect to exercise such power of appointment over such property so passing has already been taxed under the provisions of a prior statute and the said tax paid or guaranteed or secured as provided by law; and the estates of persons dying prior to the passage hereof, and all property passing by deed, grant or gift taking effect in possession or enjoyment prior to the passage hereof, and all property passing by the exercise of or failure or neglect to exercise a power of appointment prior to the passage hereof, shall remain subject to the laws in force prior to the passage hereof.

Acts of 1914, Chapter 563.

SECTION 1. Section twenty-five of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, codified as section twenty-five of Part IV of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, is hereby amended by inserting after the word "made", in the fifth line, the words:— or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred,—so as to read as follows:— *Section 25.* This part shall not apply to estates of persons deceased prior to the date when chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven took effect, nor to property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date; but said estates and property shall remain subject to the provisions of law in force prior to the passage of said chapter.

General Laws (in effect on and after January 1, 1921). Chapter 65.

SECTION 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the commonwealth or not, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the

use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

[Here follows the table of rates.]

SECTION 27 [as amended by St. 1922, c. 520, §18]. The commissioner shall determine the amount of tax due and payable upon any estate or part thereof, and shall certify the amount so due and payable to the persons by whom the tax is payable; but in the determination of the amount of any tax under this chapter the commissioner shall not be required to consider any payments on account of debts or expenses of administration which have not been allowed by the probate court having jurisdiction of said estate. Payment of the amount so certified shall be a discharge of the tax. An executor, administrator, trustee, grantee, donee or survivor aggrieved by any determination of the commissioner may, within one year after the payment of any such tax, apply by a petition in equity to the probate court having jurisdiction of the estate of the decedent for the abatement of the tax or any part thereof, and if the court adjudges that the tax or any part thereof was wrongly exacted it shall order an abatement of such part thereof as was assessed without authority of law. Upon a final decision ordering an abatement of any part of such a tax, the treasurer shall pay the amount adjudged to have been illegally exacted, with interest, without any further act or resolve making appropriation therefor.

SECTION 36. This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty, and as to all property and interests therein

passing or accruing upon the death of persons who have died prior to said date the laws theretofore applicable shall remain in force; but so much of this chapter as relates to property or interests therein passing by deed, grant or gift completed inter vivos in contemplation of death shall apply only to such deeds, grants or gifts made on or after May twenty-seventh, nineteen hundred and twenty.

Chapter 215.

SECTION 9. A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction.

SECTION 13. A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all questions of law therein for consideration of the full court, and thereupon like proceedings shall be had as upon appeal.